SUPREME COURT OF THE UNITED STATES.

No. ~~95.~~ 15.

EDWARD CARRINGTON, ET AL., PLAINTIFFS,

VERSUS

THE MERCHANTS' INSURANCE COMPANY.

CERTIFICATE OF DIVISION IN OPINION OF THE JUDGES OF THE CIRCUIT COURT U. S. FOR THE DISTRICT OF MASSACHUSETTS.

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UNITED STATES OF AMERICA: }
Massachusetts District, ss. }

At the Circuit Court of the United States, for the first circuit, begun and holden at Boston, within and for the Massachusetts district, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and thirty-one, before the honorable Joseph Story, Associate Justice, John Davis, District Judge.

Writ and Declaration.

Edward Carrington, Samuel Wetmore, and Willard W. Wetmore, all of Providence, in the State of Rhode Island, being inhabitants and citizens of said State, merchants and Copartners in trade, doing business under the firm of Edward Carrington and Company, plaintiffs, *versus* the Merchants' Insurance Company, a corporation incorporated by the General Court of the Commonwealth of Massachusetts, and the several members of which corporation are citizens of said State of Massachusetts, and living in the district of Massachusetts, defendants in a plea of the case; for that, whereas the plaintiffs, on the first day of October, in the year of our Lord eighteen hundred and twenty-four, at said Boston, according to the custom

of merchants, a certain writing, commonly called a policy of insurance, caused to be made; which said writing, or policy of insurance, is in the words and figures following, to wit:

No. 10637. *By the Merchants' Insurance Company:*

Form of Policies adopted by all the Insurance Offices in Boston, Sept. 1, 1823.

This Policy of Insurance, *witnesseth*, That the President and Directors of the Merchants' Insurance Company do, by these presents, cause Whitwell, Bond & Co. for Edward Carrington & Co. of Providence, R. I. to be assured, lost or not lost, ten thousand dollars on property on board ship General Carrington, at and from the port of Coquimbo, in Chili, to any port or ports, place or places, one or more times, for and during the term of twelve calendar months, commencing on the fifth day of June, 1824, at noon, and ending on the fifth day of June, 1825 at noon. In case the ship should then be on a passage, this insurance to continue till the ship arrive at her port of destination, and until discharged, the assured paying to the assurers a premium, pro rata, for the extra time. In case the vessel should be sold during the continuance of the insurance, the assurers are to return to the assured a premium, pro rata, for the time the insurance would have to continue, whereof is master for this present voyage, Martin; or whosoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel or master thereof is, or shall be named or called; beginning the adventure upon the said property, as aforesaid, and to continue during the voyage aforesaid, on the vessel, until she shall be arrived and moored at anchor twenty-four hours in safety; and, on the property, until landed. And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this assurance.

Sum insured, $10,000.

Touching the adventures and perils which the said Insurance Company are contented to bear, and take upon them in this voyage, they are: of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever, barratry of the master, (unless the assured be owner of the vessel,) and of mariners, and all other losses and misfortunes which have or shall come to the damage of the said property, or any part thereof, to which assurers are liable by the rules and customs of assurance in Boston: *Provided*, That the assurers shall not be liable for any partial loss on sugar, flax-seed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, hemp, flax, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel, or freight, unless it amount to five per cent. exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. And in case of any loss or misfortune, it shall be lawful for the assured, their factors, servants, and assigns, to sue, labor and travel for, in and about the defence, safeguard, and recovery of the said property, or any part thereof, without

Vessel valued at $

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prejudice to this assurance; to the charges whereof the said Insurance Company will contribute in proportion as the sum assured is to the whole sum at risk. And so the President and Directors, aforesaid, are contented; and do, hereby, bind the capital stock, and other common property of the said Insurance Company to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this assurance, by the assured, at and after the rate of five and a half per cent. per annum.

And it is hereby agreed, that if the assured shall have made any other assurance upon the property, aforesaid, prior in date to this policy, then the said Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said Insurance Company shall return the premium, or a rateable part thereof, upon so much of the sum by them assured, or for such part of the voyage as they shall be exonerated from by such prior insurance, excepting half per cent., which shall be retained in all cases of return premium: *Provided*, That no return premium shall be made for any passage whereon the risk has once commenced. And in case of any assurance upon the said property, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said Insurance Company shall, nevertheless, be answerable to the full extent of the sum by them herein assured, without right to claim contribution from such subsequent assurers; and shall, accordingly, be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. And, in case of loss, the assured is to abate one per centum; and such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the Company, from the assured, when such loss becomes due, being first deducted; and all sums coming due being first paid, or secured to the satisfaction of the said President and Directors, they discounting interest for anticipating payment. It is also agreed, that in case of capture or detention, the assured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention, (by capture or other arrest) for at least ninety days; and that the assured shall not abandon in consequence of the port of destination being blockaded; but the vessel shall, in such case, have liberty to proceed to another port, not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised; and that the act of the assured or assurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment.

Premium $550.

It is also agreed that the assurers shall not be answerable for any charge, damage, or loss which may arise in consequence of seizure, or detention for, or on account of, illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular, or colonial court, shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations.

It is also agreed, that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent, in writing, of the assurers. It is also agreed, that the assured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount

which the assurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured; and in case of a total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew, for wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage, and not as wages; and shall, accordingly be deducted in adjusting the loss. It is further agreed, that, if any dispute shall arise, relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators, mutually chosen, whose award, in writing, shall be conclusive and binding on all parties. *The Company are not liable for wages or provisions, except in general average.*

In witness whereof, the President of the said Merchants' Insurance Company hath hereunto subsribed his name, and caused the same to be countersigned by their Secretary, at their office in Boston, this first day of October, one thousand eight hundred and twenty-four.

Which said policy was thereafterwards, to wit, at said Boston, on said first day of October, subscribed by Joseph Balch, the President of said Company, and countersigned by Andrew G. Winslow, their Secretary. Of which writing or policy of insurance, made, as herein before set forth, the said Company had notice, to wit, on said first day of October, at said Boston, and in consideration that the said plaintiffs had paid them, said Company, the sum of five hundred and fifty dollars, as a premium for the insurance of ten thousand dollars, according to the tenor of the aforesaid policy of insurance, and promised to perform all things contained in said writing, or policy of Insurance on their, the said plaintiffs, part to be performed. Thereupon, thereafterwards, on the same day, the said Company promised the said plaintiffs that they would become, and they did then and there become, assurers of the property on board the said ship General Carrington, for the voyage, aforesaid, according to the tenor and effects of the writing, aforesaid, for the said sum of ten thousand dollars; and that they would perform and fulfil all things in the said writing, or policy of insurance, contained, on their part and behalf, to be performed and fulfilled as such assurers. And the aaid plaintiffs further say, that the said ship, with divers goods and merchandise laden on board her, belonging to the plaintiffs, of great value, to wit, of the value of sixty thousand dollars, afterwards proceeded on her said voyage; and, in the course of said voyage, touched and stopped at the port of Quilea, in the province of Peru and that said ship, while in the harbor of said port of Quilea afterwards, after the said fifth day of June, in the year of our Lord eighteen hundred and twenty-four, and within the term of twelve months from said fifth day of June, to wit, on the fifth day of July, in the year of our Lord eighteen hundred and twenty-four, with force and arms, and in a hostile manner, was attacked, taken, and caried away by certain persons, acting under the command of one Rodil, then acting as Governor of the castle of Callao, under the King of Spain; and the said property, on board the said ship, thereby become wholly lost to the plaintiffs; and the plaintiffs aver, that they were interested in the property on board said ship, and were owners thereof to the amount of ten thousand dollars, aforesaid; and were also owners of property on board of said ship to the full amount of all the insurance made on the same; of all which the said Company afterwards, to wit, on the ninth day of August, in the year of our Lord eighteen hundred and twenty-five, at said Boston, had notice and proof; and although the said plaintiffs have perfor

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ed all things, by virtue of said policy, on their part to be performed, yet the said Company, though requested, have not paid the plaintiffs the said sum of ten thousand dollars, or any part thereof; but refuse so to do.

And also, for that, whereas, the said plaintiffs, at said Boston, on the said first day of October, according to the custom of merchants, caused a certain other writing, or policy of insurance, to be made in the same words and figures with that set forth in the preceding count, which said last mentioned policy was thereafterwards, at said Boston, on said first day of October, subscribed by Joseph Balch, the President of said Company, and countersigned by Andrew G. Winslow, their Secretary; of which writing, or policy, the said Company had notice, to wit, on said first day of October, at said Boston; and thereupon, thereafterwards, on the same day, in consideration that the aaid plaintiffs had paid the said Company the sum of five hundred and fifty dollars, as a premium for the insurance of ten thousand dollars, according to the tenor of the aforesaid policy of insurance, and promised to perform all things contained in said policy on their part to be performed, the said Company promised the said plaintiffs that they would become, and they did then and there become, assurers of the property on board the said ship General Carrington, in said last named policy mentioned, for the voyage, aforesaid, according to the tenor and effect of said last mentioned policy, for the sum of ten thousand dollars; and that they the said Company would perform and fulfil all things in the said last mentioned policy contained, on their part and behalf to be performed and fulfilled as such assurers. And the said plaintiffs further say, that the said ship, with divers goods and merchandises landen on board her, belonging to the plaintiffs, of great value, to wit, of the value of sixty thousand dollars, while lying in the harbor of the port of Quilea, in the province or territory of Peru, in the course of the voyage mentioned in said last mentioned policy, after said fifth day of June, in the year of our Lord eighteen hundred and twenty-four, and within the term of twelve months from the said fifth day of June, to wit, on the fifth day of July, in the year of our Lord eighteen hundred and twenty-four, was arrested, restrained, and detained by certain persons, acting under the authority of one Rodil, then acting as Governor of the castle of Callao, under the King of Spain, whereby the said property on board said ship, mentioned in said last named policy, became and was totally lost; and the said paintiffs, in fact, say, that their interest in the property on board said ship, so assured, as aforesaid, by said last mentioned policy, at the time of making the said policy, from thence and until, and at the time of the loss, aforesaid, amounted to a large sum of money, to wit, to the sum of ten thousand dollars, so insured, as aforesaid, and of all the money ever insured, or caused to be insured, thereon, of all which said premises the said Company afterwards, to wit, on the ninth day of August, in the year of our Lord eighteen hundred and twenty-five, at said Boston, had notice and proof; and although the said plaintiffs have performed all things, by virtue of said last mentioned policy, on their part to be performed and fulfilled, yet the said Company, though requested, have not paid the said plaintiffs the said sum of ten thousand dollars, nor any part thereof, but neglect and refuse so to do.

And also, for that, whereas, the said plaintiffs, at said Boston, on said first day of October, did cause, according to the custom of merchants, another policy of insurance to be made in similar words and figures to that mentioned in the first of the preceding counts, which said policy was thereafterwards, at said Boston, on said first day of October, subscribed by Joseph

Balch, the President of said Company, and countersigned by Andrew G. Winslow, their Secretary; of which policy of insurance the said Company had notice, to wit, on said first day of October, at said Boston; and thereupon thereafterwards, on the same day, in consideration that the plaintiffs had paid the said Company the sum of five hundred and fifty dollars as premium for the insurance of ten thousand dollars, according to the tenor of said last mentioned policy of insurance, and had promised to perform all things contained in said policy, on their part to be performed, the said Company promised the said plaintiffs that they would become, and they did then and there become, assurers on the property on board the said ship General Carrington, and for the voyage, aforesaid, in said last named policy mentioned, according to the tenor and effect of said last mentioned policy, for the sum of ten thousand dollars; and that they, the said Company, would perform and fulfil all things in the said last mentioned policy contained, on their part and behalf to be performed and fulfilled as such assurers; and the said plaintiffs further say, that the said ship, with divers goods and merchandises loaded on board her, belonging to the plaintiffs, of great value, to wit, of the value of sixty thousand dollars, while lying in the harbor of the port of Quilea, in the province of Peru, in the course of the voyage mentioned in said last named policy, after said fifth day of June, in the year of our Lord eighteen hundred and twenty-four, and within the term of twelve calendar months from the said fifth day of June, to wit, on the fifth day of July, in the year of our Lord eighteen hundred and twenty-four, was, with force and arms, and in a hostile manner, attacked, conquered, and taken by pirates; and by means thereof the said property on board said ship, mentioned in said last named policy, became and was totally lost; and the said plaintiffs in fact say, that their interest in the property on board said ship, so assured, as aforesaid, by said last mentioned policy, at the time of making said policy, from thence and until, and at the time of the loss aforesaid, amounted to a large sum of money, to wit, the sum of ten thousand dollars, so insured as aforesaid, and of all the money ever insured or caused to be insured thereon, of all which said premises the said Company afterwards, to wit, on the ninth day of August, in the year of our Lord eighteen hundred and twenty-five, at said Boston, had notice and proof; and although the plaintiffs have performed all things, by virtue of said last mentioned policy, on their part to be performed and fulfilled; yet the said Company, though requested, have not paid the said plaintiffs the said sum of ten thousand dollars, nor any part thereof, but neglect and refuse so to do.

And also, for that, whereas, the said Company, at said Boston, on the day of the purchase of this writ, being indebted to the plaintiffs in the sum of one thousand dollars, for so much money before that time had and received by the said Company to the plaintiffs use, in consideration thereof, then and there promised the plaintiffs to pay them that sum on demand; yet, though requested, they have not paid the same, but refuse so to do.

And also, for that, whereas, the said Company, at said Boston, on the day of the purchase of this writ, being indebted to the plaintiffs in the further sum of five thousand dollars for so much money, before that time, laid out and expended by the plaintiffs for the use of the said Company, at their request, in consideration thereof, then and there promised the plaintiffs to pay them that sum on demand; yet, though requested, they have not paid the same, but neglect and refuse so to do, to the damage of the said plantiffs, as they say, the sum of twenty thousand dollars.

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This action was entered at the October term, A. D. 1826, and thence was continued from term to term, until the May term, A. D. 1828, when the plaintiffs, by leave of court, amended, by filing three additional counts, as follows:

New Counts.

Circuit Court United States, Massachusetts District. May Term, 1828.

EDWARD CARRINGTON, ET AL.
versus
THE MERCHANTS' INSURANCE COMPANY.

And now the plaintiffs, by leave of the Court, here amend, by filing three additional counts, as hereto annexed.

By their Attorneys,

L. SHAW & S. HUBBARD.

And also, for that, whereas, the said plaintiffs, at said Boston, on the said first day of October, according to the custom of merchants, caused a certain other writing, or policy of insurance, to be made, in similar words and figures to that mentioned in the first of the preceding counts; which said policy was thereafterwards, at said Boston, on said first day of October, subscribed by Joseph Balch, the President of said Company, and countersigned by Andrew G. Winslow, their Secretary, of which policy of insurance the said Company had notice, to wit, on said first day of October, at said Boston; and thereupon thereafterwards, on the same day, in consideration that the plaintiffs had paid the said Company the sum of five hundred and fifty dollars, as a premium for the insurance of ten thousand dollars, according to the tenor of said last mentioned policy of insurance, and had promised to perform all things contained in said policy, on their part to be performed, the said Company promised the said plaintiffs that they would become, and they did then and there become, assurers on the property on board the said ship General Carrington, and for the voyage, aforesaid, in said last named policy mentioned, according to the tenor and effect of said last mentioned policy, for the sum of ten thousand dollars; and that they, the said Company, would perform and fulfil all things in the said last mentioned policy contained, on their part and behalf to be performed and fulfilled, as such assurers; and the said plaintiffs further say, that the said ship, with divers good and merchandises loaded on board her, belonging to the plaintiffs, of great value, to wit, of the value of sixty thousand dollars, afterwards proceded on her said voyage; and in the course of said voyage, to wit, at the port of Quilea, in the kingdom, province, republic, or territory of Peru, after the said fifth day of June, in the year of our Lord eighteen hundred and twenty-four, and within the term of twelve months from the said fifth day of June, to wit, on the fifth day of July, in the year of our Lord eighteen hundred and twenty-four, the said ship, together with the said property on board the same, with force and arms, and in a hostile manner, was attacked, taken, and carried away by certain persons, to the plaintiffs wholly unknown; by means whereof the said property, on board said ship, became, and was wholly lost to the plaintiffs; and the plaintiffs aver that they were interested in the property on board said ship, so assured, as aforesaid, by said last mentioned policy, at the time of making said policy, from thence and until, and at the time of the loss, aforesaid, to

a large amount, to wit, the sum of ten thousand dollars, so insured, as aforesaid; and of all the money ever insured, or caused to be insured thereon, of all which said premises the said Company afterwards, to wit, on the ninth day of August, in the year of our Lord eighteen hundred and twenty-five, at said Boston, had notice and proof; and although the said plaintiffs have performed all things, by virtue of said last mentioned policy, on their part to be performed and fulfilled; yet, the said Company, though requested, have not paid the said plaintiffs the said sum of ten thousand dollars, nor any part thereof, but neglect and refuse so to do.

And also, for that, whereas, the said plaintiffs, at said Boston, on the said first day of October, did cause, according to the custom of merchants, another policy of insurance to be made, in similar words and figures, to that mentioned in the first of the preceding counts, which said policy was thereafterwards, at said Boston, on said first day of October, subscribed by Joseph Balch, the President of said Company, and countersigned by Andrew G. Winslow, their Secretary; of which policy of insurance the said Company had notice, to wit, on said first day October, at said Boston, and thereupon, thereafterwards, on the same day, in consideration that the plaintiffs had paid the said Company the sum of five hundred and fifty dollars, as a premium for the insurance of ten thousand dollars, according to the tenor of said last mentioned policy of insurance, and had promised to perform all things, contained in said policy, on their part to be performed, the said Company promised the said plaintiffs that they would become, and they did then and there become, assurers on the property on board the said ship General Carrington, and for the voyage, aforesaid, in said last named policy mentioned, according to the tenor and effect of said last mentioned policy, for the sum of ten thousand dollars; and that they the said Company would perform and fulfil all things, in the said last mentioned policy contained, on their part and behalf to be performed and fulfilled, as such assurers; and the said plaintiffs further say, that the said ship, with divers goods and merchandises loaded on board her, belonging to the plaintiffs, of great value, to wit, of the value of sixty thousand dollars, afterwards proceeded on her said voyage, and in the course of said voyage, to wit, at the port of Quilea, in the province of Peru, after the said fifth day of June, in the year of our Lord eighteen hundred and twenty-four, and within the term of twelve months from the said fifth day of June, to wit, on the fifth day of July, in the year of our Lord, eighteen hundred and twenty-four, the said ship, together with the said property on board the same, with force and arms, and in a hostile manner, was attacked, taken, and carried away by certain persons, pretending to act in the name and by the authority of the King of Spain; but who were not duly and lawfully authorized for that purpose, but wrongfully, and without any justifiable cause, attacked, took, and carried away said ship, and the said property; by means whereof the said property, on board said ship, became, and was wholly lost to the plaintiffs; and the plaintiffs aver that they were interested in the property on board said ship, so assured, as aforesaid, by said last mentioned policy, at the time of making said policy, from thence and until, and at the time of the loss, aforesaid, to a large amount, to wit, the sum of ten thousand dollars, so insured, as aforesaid, and of all the money ever insured or caused to be insured thereon; of all which said premises, the said Company afterwards, to wit, on the ninth day of August, in the year of our Lord, eighteen hundred and twenty-five, at said Boston, had notice and proof; and although the said plaintiffs have

performed all things, by virtue of said last mentioned policy, on their part to be performed and fulfilled, yet the said Company, though requested, have not paid the said plaintiffs the said sum of ten thousand dollars, nor any part thereof, but neglect and refuse so to do.

And also, for that, whereas, the said plaintiffs, at said Boston, on the said first day of October, according to the custom of merchants, caused a certain other writing, or policy of insurance, to be made, in similar words and figures, to that mentioned in the first of the preceding counts; which said policy was thereafterwards, at said Boston, on said first day of October, subscribed by Joseph Balch, the President of said Company, and countersigned by Andrew G. Winslow, their Secretary; of which policy of insurance the said Company had notice, to wit, on said first day of October, at said Boston, and thereupon, thereafterwards, on the same day, in consideration that the plaintiffs had paid the said Company the sum of five hundred and fifty dollars as a premium for the insurance of ten thousand dollars, according to the tenor of said last mentioned policy of insurance, and had promised to perform all things contained in said policy, on their part to be performed, the said Company promised the said plaintiffs that they would become, and they did then and there become, assurers on the property on board the said ship General Carrington, and for the voyage aforesaid, in said last named policy mentioned, according to the tenor and effect of said last mentioned policy, for the sum of ten thousand dollars; and that they, the said Company, would perform and fulfil all things, in the said last mentioned policy contained, on their part and behalf to be performed and fulfilled, as such assurers. And the said plaintiffs further say, that the said ship, with divers goods and merchandises, loaded on bord her, belonging to the plaintiffs, of great value, to wit, of the value of sixty thousand dollars, afterwards proceeded on her said voyage, and in the course of said voyage, to wit, at the port of Quilea, in the province of Peru, after the said fifth day of June, A. D. eighteen hundred and twenty-four, and within the term of twelve months from said fifth day of June, to wit, on fifth day of July, in same year, was seized, taken, and carried away, by certain persons, pretending to act under color of authority and power derived from the King of Spain; and being so seized and carried away, the plaintiffs aver, that, no lawful adjudication was ever had thereon, by any tribunal legally authorized for that purpose; but that said property, on board said ship, so taken under such color of authority, was, by the captors, or others, appropriated to their own use; by means whereof, the said property, on board said ship became, and was, wholly lost to the plaintiffs. And the plaintiffs aver that they were interested in the property on board said ship, so assured, as aforesaid, by said last mentioned policy, at the time of making said policy, from thence and until, and at the time of the loss, aforesaid, to a large amount, to wit, the sum of ten thousand dollars, so insured, as aforesaid, and of all the money ever insured, or caused to be insured thereon; of all which premises the said Company afterwards, to wit, on the ninth day of August, in the year of our Lord eighteen hundred and twenty-five, at said Boston, had notice and proof; and although the said plaintiffs have performed all things, by virtue of said last mentioned policy, on their part to be performed and fulfilled, yet the said Company, though requested, have not paid the said plaintiffs the said sum of ten thousand dollars, nor any part thereof, but neglect and refuse so to do.

From said May term, A. D. 1828, the cause was continued from term to term, until this October term, A. D. 1831.

And now the said Merchants' Insurance Company, by their attorneys, Daniel Webster and Franklin Dexter, come, &c. when, &c. and for plea, say, that they never promised in manner and form, as the plaintiffs have thereof declared against them, and of this they put themselves on the country. And the plaintiffs, by their attorneys, Leverett Saltonstall and Samuel Hubbard, do the like.

Facts in Evidence.

EDWARD CARRINGTON, ET AL.
versus
THE MERCHANTS' INSURANCE COMPANY.

Circuit Court United States, First Circuit, Massachusetts District, October Term, 1831.

In this case, the following facts appeared in evidence:

The policy of insurance set forth in the plaintiffs' declaration, of which a copy is annexed, was duly underwritten by defendants on the day of the date thereof. The ship General Carrington, and the principal part of her cargo, belonged to the plaintiffs. She sailed on the twenty-first day of December, eighteen hundred and twenty-three, from Providence. Cleared for the Sandwich Islands and Canton, but bound immediately to Valparaiso, with such further destination, as appears by the orders annexed, which was a usual and customary mode of clearance for vessels bound to Chili and Peru.

A copy of the orders to the master and supercargo, and to William S. Wetmore, the agent abroad, marked A, B, C, are hereunto annexed, as part of the evidence in the case. A part of the cargo consisted of eighteen cases of English muskets and bayonets, each case containing twenty; and three hundred and sixty kegs, or quarter-kegs, of cannon powder, containing twenty-five pounds each. At the time of the commencement of the voyage, and until after the final loss of the vessel, open hostilities existed between Spain and the new Government, or new State of Chili and Peru.

The vessel arrived at Valparaiso, in Chili, on the seventeenth day of April, A. D. 1824. At the time of the arrival of said vessel, and until after the loss thereof, as hereinafter mentioned, the Spanish royal authorities were in possession of a portion of Upper Peru, including Quilea and Moliendo, and of the port of Callao, in Lower Peru. The rest of Peru, and the whole of Chili, were in the possession of the Peruvian and Chilian new Governments. In the harbor of Valparaiso sixteen casks of said powder were, with the knowledge of the Government, sent on board an English brig, in said harbor, and, as plaintiffs allege, sold to the master of said brig; and all the muskets and bayonets, except ten, alleged to be kept for the ship's use, were landed in Valparaiso, with the knowledge of the Government.

The said ship General Carrington, with the remainder of her cargo on board, sailed from Valparaiso, early in the month of May, and arrived at Coquimbo, in Chili, on the thirteenth day of said May. There the remainder of the powder, except nine casks, more or less damaged, alleged to be retained for ship's use, was landed during the month of May, with the knowledge of the Government. The ship sailed from Coquimbo for Huasco,

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also in Chili, on or about the 5th day of June, and arrived at Huasco in the same month of June; and thence proceeded to Quilea, in Peru, having sold, at the previous ports, a part of her outward cargo by permission of the Government, as plaintiffs allege, and taken in merchandise belonging to the plaintiffs, and other citizens of the United States, to be delivered in some of the ports on the coast. She arrived at Quilea with the greater part of her outward cargo still on board, on the twentieth day of June, eighteen hundred and twenty-four, and there sold, with the knowledge of the Government, as plaintiffs allege, a considerable portion of her outward cargo, and delivered some of the articles taken in at the previous ports. While lying at anchor in the roadstead of Quilea, and before she had completed the discharge of her outward cargo, she was seized by an armed vessel, called the Constante, commanded by one Jose Martinez, sailing under the royal Spanish flag, and acting, as the defendants allege, by the royal authority of Spain; but alleged by the plaintiffs to be fitted out and commissioned at Callao by Jose Ramon Rodil, the highest military commander of the castle of Callao, holding his commission subordinate to La Serna, the Vice Roy of Peru, under the King of Spain, there being, as the defendants allege, no regular civil Government in the place; the castle of Callao being then, and until the final loss of said vessel, besieged by sea and land. The said ship was carried from Quilea into Callao, where certain proceedings were had against said ship, and her cargo on board, by the orders of said Rodil, and they were never restored, but were totally lost to the plaintiffs.

The following are the orders marked A, B, C, before mentioned.

(A.)

PROVIDENCE, *December* 18, 1823.

Captain WILLIAM MARTIN,
Master of ship General Carrington:

DEAR SIR: Having agreed with you to go master of our ship General Carrington, now ready for sea, with stores, and otherwise well fitted for the voyage, our instructions are, that you proceed direct to Valparaiso. On your arrival there, deliver your cargo to William S. Wetmore, or, in his absence, to Mr. Charles B. Brintnall, and yourself on board. Our expectations are, that some part of the cargo will be sold at Valparaiso, and thence proceed along the coast of Lima, stopping at such places, for trade, as you and he may think best, going backwards and forwards until the cargo is disposed of. Mr. Wetmore has our instructions to let the ship to freight, if profitable business can be had in freighting and passengers, or to take freight to this country, Europe, East Indies, or any part of the world, or to sell the ship. In all these matters you will follow the instructions given to Mr. Wetmore. Provided he is absent, we recommend your keeping your journal, and all other accounts on board, as bound to the Sandwich Islands, and ports on the northwest coast of America, for which ports your ship is cleared. On your arrival on the coast of Chili, you will run direct for Valparaiso, and go into that port under the plea of water, which you will take care to be in want of, so as to leave no doubt of the fact. Should there be any changes in the Government, to make it necessary to use precaution, on your arrival out you will find Mr. Wetmore, and follow the instructions we have

given him. Should he be absent, and in case the ship is sold, you will endeavor to find employment for the men in that country, or ship them in some other vessel bound home, or to Europe, on wages, so as to be at as little expense as possible. If nothing better can be done, you must discharge them, and pay them one, two, or three months, sufficient to get them home. We expect you will find no difficulty in getting rid of them, without any advances, as it is probable the men will be wanted, and the wages high. You must not advance them much abroad, particularly if you go a freighting, or to any other country; for if you do, they certainly will desert the ship if there should be any demand for men, and the wages higher; and you will have to replace them at higher wages: so, if you lose on one hand you must be careful to gain on the other. We recommend you to be particularly careful of the ship and keep her in good order, and use as much economy as possible; purchase nothing but what is absolutely necessary. The times are hard, and money cannot be made without great savings; and we have the fullest confidence in your good management and care to conduct our business in the best possible manner and prudence. Wishing you a safe and prosperous voyage,

We are your friends.

We have not put on board so much bread, for stores, as we intended, for want of room. Should you sell the ship you will have enough, but should you find employment in freighting, and should be in want of more bread, you must take it from the cargo.

Yours.

I acknowledge the above to be a true copy.

[Signed] WILLAM MARTIN.

(B.)

PROVIDENCE, *December* 17, 1823.

Captain WILLIAM MARTIN & Mr. CHARLES B. BRINTNALL:

DEAR SIRS: Should you not find Mr. William S. Wetmore on your arrival, and learn he has left the country, you will, in that case, take upon yourselves to dispose of the cargo now on board the Carrington. But if you learn Mr. Wetmore is at Lima, or any where on the coast, we then wish you to proceed direct to him; or if expected soon at Valparaiso, await his arrival, unless you should have favorable opportunities to make sale of part of your cargo before his return, in which case we wish you to exercise your judgment. We have given to Mr. Brintnall our letter for Mr. Wetmore respecting the sales of the cargo, and left it open for his perusal, and by which you will see our views and wishes respecting sales, returns, and remittances. To this letter we refer you for a guide in transacting the business, should it fall upon you to manage it. We recommend your employing Messrs. Frost, Jenckes & Co. at Valparaiso, to assist you in your transactions at that place, agreeing with them for the commissions you are to pay them. This house has done our business, and we have no doubt they will give you every information respecting markets in Peru, &c. &c. We recommend your informing yourselves, as far as possible, the state of the markets in the various ports, and then be governed by circumstances and information, whether you will sell at Valparaiso or go to other markets. We

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recommend to you to be very cautious to whom you sell, and not to part with your goods without payment in hand or without the best security. It is a very good way to sell goods to be delivered on board, and let the purchasers pay the duties. By selling to deliver on board you avoid all after disputes about qualities and quantities, and all trouble about duties; besides, by selling to deliver or board, you can always ask for payment on board before the goods are delivered.

Arica, Lima, Guyaquil, and other ports in Peru, are the best calculated for the sale of your linens, and, indeed, most of your cargo. We recommend your keeping your money, you receive for sales, on board your ship, or on board our public ships. As often as you have opportunity to remit to Canton, send all you can to Messrs. Samuel Russell and Company, at that place, for our account. If no opportunity to remit to Canton, and there are opportunities to this country, you will remit to the United States, consigned to us. The whaling ships afford good opportunities to remit by.

After disposing of the cargo, you will endeavor to get a freight for the ship, either by employing her on the coast, or to Europe, or this country, or China. You will bear in mind, if you go to Canton, the port charges there will amount to about five thousand dollars. If you cannot get any freight or employment for the ship, you must paint her up and endeavor to sell her. We should think, fitted as she is for paeketing, she would bring twelve thousand dollars, and that sum, we should think it would be better to sell her, but we think she would bring a much higher price. If you sell her, you must endeavor to find births for your crew, to go on wages, particularly your officers; the crew will always find employment in that country. If you dont find employment for the vessel, nor any opportunity to sell her, you must either return here with her, or go to the Sandwich Islands and Canton. If you should be fortunate in making sales, and there should be no opportunity of remitting to Canton, we should then recommend your taking the proceeds of the cargo on board in dollars, plata pina, and block-tin, and go for Canton, stopping on your way at the Sandwich Islands. In case you sell the ship there, where, if you make your vessel look well, she may sell for a good price, there are always vessels at the Sandwich Islands, in case you sell the ship there, by which you could freight your property to Canton. If you decide to come home with the ship, you can then bring us hides, block tin, plata pina, and dollars, but no pig copper. Block tin cost 12 cents per last account, and plata pina eight dollars per mark of eight ounces. If you sell the ship, you will return the register, or leave it with a consul, and take a certificate from him for it.

A true copy,

[Signed] WM. MARTIN.

(C.)

PROVIDENCE, *December* 18, 1823.

Mr. WILLIAM S. WETMORE:

DEAR SIR: We wrote you under date 9 October and 24 ultimo, copy we here enclose, and beg your perusal: our ship General Carrington, captain William Martin, being now ready for sea. We take pleasure in handing you invoice and bill of lading of sundry merchandise, consisting of German

linens, German steel, glass tumblers, ladies' and mens' shoes and boots, prime beef and pork, pilot and navy bread, brown domestic goods, coffee, muskets, and powder, to your consignment. On the arrival of this ship, we request you will take charge of the cargo, and make sales at such time and places as you think most advantageous to us. We sent this ship to Hamburgh with the express purpose of selecting these linens, and we believe the quality and descriptions are suited to the Chili and Peru markets. We have had them all put up in small packages, from 180 to 200 pounds, which are calculated to be transported by mules, which will give you considerable advantage in selling. The muskets are all English, tower proof, bright, and in fine order. We intended to have sent more if they could have been procured. The powder is good, and we hope it will turn out so on arrival with you. Every other article is good, and put up in good order, and we hope will arrive safe to a good market. Our expectation is, that you will sell what you can at Valparaiso to advantage, and then take passage on board, and proceed to Coquimbo, Lima, and such other ports, backward and forward, as you may think most adviseable for the sale of your cargo. We expect you will find a pretty ready sail for this cargo, being generally staple, and not numerous. Our last advices from Lima, of second August, the country continued in a very unsettled state, and hardly any thing doing, and probably will not until the result of the expedition to Arica is known Before this ship arrives we expect that question will be settled, and let it fall in the hands of the Patriots or Spaniards, we expect there will be some pretty good freighting. We hardly need repeat to you how important it will be for you to keep the property within your own hands and control. In the revolutionary times, when men are every day liable to be driven from their homes by the enemy, and leave their property, we cannot expect, in these times, much honor or honesty. Besides, the war in Spain is at end, and the Spanish Government talk of sending a large naval force, with troops, to Lima, and other places, and retake all their South American possessions; and a Congress is talked of by the allied Powers of Europe to take this subject into consideration, and it is not improbable that the French Government will aid them in the expedition. You ought to be on your guard against every possible difficulty, and keep your money and goods as snug as possible. After selling this cargo, you will see what can be done with the ship General Carrington. This ship is two years old and fitted for a packet, and has run as such between New York and Savannah, was coppered two months since, is in fine order, and in every respect well fitted with sails, rigging, beds, furniture, to accommodate thirty passengers. We have thought a profitable business might be done in coasting with freight and passengers, being of suitable size, and sails remarkably fast; or we would sell her, if nothing better can be done, at twelve thousand dollars, though we should expect a packet of her class, coppered, and in all other respects well fitted, ought to bring twenty thousand dollars. If there is no freighting on the coast, nor no sales for the ship, you must try to get a freight to Europe or this country, or China, or to any other part of the world. We leave it entirely with you to manage and give her such direction as you may judge most for our interest. The proceeds of this cargo, together with any money you may have belonging to us, we wish remitted to Mr. Samuel Russell, at Canton, or to us in this country, giving the preference to China, if there is an opportunity; but not to keep it on hand any length of time. If there is a opportunity for China or this country, when it is away, it is safe. The wha

ing ships afford a good opportunity of remitting to this country. Should you conclude to send the ship home, you must send as much specie home as you can, unless you have a good opportunity to send to China. We hope you have been able to make sales of the remainder of Lion's cargo, and the money collected and remitted to Canton by the George, as we expect this ship was despatched by Messrs. Frost, Jenckes & Co. with pretty considerable funds from her China cargo, and the remainder of her cargo from this country, and the Ospray's cargo from China. We have sent Mr. Charles B. Brintnall out in the ship to take the care of all the papers to your address, with a view of taking charge of the cargo in case of any accident to, or your absence. His principal object is information, and we recommend him to your particular care and atiention: you will find him a very capable and fine young man. He will be of great use to you in the sales and delivery of your cargo, and you can trust him on any expedition whatever. We cannot recommend any articles shipped to this country, except hides, if bought low; block-tin, to cost 11 to 12½ cents; copper will not answer. Should you determine to send the Carrington home, on our account, from Lima, and you can purchase a quantity of block-tin, say twelve to fifteen hundred quintals, to cost 11 to 12 cents, we think a freight may be had. The block tin sent by Captain Andrews sold for fifteen cents, cost twelve cents, which gave some profit. Hides, if handsome and smooth, and laid in about the same as those you shipped by the O'Cain, will answer as well as any remittance you can make. The price of hides is falling at Buenos Ayres, and we should expect the price will decline in Chili. We would avoid copper altogether for this country: our country is full, and very dull at 14½ and 15 cents, and we doubt if any quantity would bring even that price. Plata pina and Spanish dollars make the best remittance. Dollars with holes, and Patriot dollars should be avoided altogether: they will not pass. Plata pina will pay a profit at the cost of eight dollars the mark, at our mint, or to ship to China. There is a loss on gold: we cannot ascertain what it is, until we send some we have to the mint. As soon as we ascertain it, we will inform you for your government. We intend sending some of our plata pina to the mint to ascertain its value. We should, therefore, recommend shipments by our own vessels, say, block tin, hides, plata pina, Spanish dollars; if sent home on freight, in plata pina and Spanish dollars only; if to China, the plata pina will do best, next, Spanish dollars. We would recommend no copper sent to China, unless by our own vessels; the high cost, with addition of freight, being too heavy a loss. Mr. Jenckes has not arrived: he left Rio about the twentieth of September. He there reshipped all our specie on board the Friendship, of Salem: safely arrived. He has on board, for us, about two thousand dollars cost in Chin Chili skins, Our winter is now setting in so severe we dont expect to do much more business this year, and we hope soon to have such favorable accounts from your side, as to induce us to send our new ship early next spring to your address. Should this be so, she will be called the Lion, and commanded by Captain Green.

Being desirous of bringing all our business with Messrs. Frost, Jencks & Co. and Lynch, Hill & Co. and E. Lynch & Co. Lima, to a close, we have executed our power of attorney to you, to fully authorize you to make settlement, and receive such money, obligations, and goods, as you may find expedient to take into your possession. We also put under the charge of

Mr. Brintnall, copies of all Mr. Jencks' accounts and expenses, invoices, &c. in order. From the commencement of the voyage per the Ospray to the 2d April, 1823, they have been found correct as far as we know; and the balance of $6,610 79. We have received by the Friendship, of Salem, the charge of $252 25, in the last account current, for disbursments of ship Lion: you can tell whether correct. The transactions, per the Viper, is all settled, except a few articles remaining unsold and unaccounted for, which you will see by papers marked A, and a paper marked A, A. We have not gone back to the transactions of the Viper, but will thank you to look after what remains unaccounted for from that vessel. The next, marked B, is what remains unaccounted for from the Ospray's cargo; next, marked C, the George's cargo, from Providence; next, marked D, is the George's cargo from Canton. We are anxious to sell all the goods on hand, from the above cargoes, as soon as it can be done to advantage; and we leave it to your discretion whether to take all the goods from them, or let them remain in their hands for sale; at any rate, we wish you to advise and direct in all things, considering our interest. Whether in their hands or any one's else, we wish you, by all means, to take the proceeds of sales as fast as they are made, and remit them to us, or to China, with as little delay as possible. If these gentlemen made any advances to the ship George, we presume they have sold enough to reimburse themselves before this. We shall write these gentlemen on the subject. As regards Lynch, Hill & Co. at Valparaiso, we do not know as we have any thing in their hands. We suppose Mr. Jencks drew every thing from them; but should you find any property of ours with them, you will call for it. We do not know as we have any property with Lynch & Co. of Lima, except what will be settled by Captains Andrews, Matthewson, and other Captains; but, should you find any property there, you will also please take it in your possession. These accounts of Mr. Jenckes will give you a full view of all his transactions, so that you will have but little trouble to examine them. We beg of you to do every thing that prudence may dictate, to get our property in the hands of Frost, Jencks & Co. disposed of and remitted. We have too much at hazard in that country, should Old Spain attempt to reconquer that country. We wish you not to leave the country until you get all things snug; and we think there is no doubt but we shall send a handsome cargo to you early next year.

We do not know what Captain Pearce, in the General Hamilton, is doing: we fear a bad business. We hope soon to hear that he has left that country. You will please to caution all our Captains that visit that country to guard their property, and keep it under their own control, for fear of a change of affairs in that country. You will send us landing certificates of all the linens, glass-ware, steel, iron, coffee, and nine cases muskets marked E. M. –||– 76 *a* 8 D. C.

We are your friends,
EDWARD CARRINGTON & Co.

Captain Rea writes us, under date 25 July, that he had sold at the Sandwich Islands,

5 boxes copper 2723 nett *a* 40 cents - -	$1089 20	
2 kegs nails 488 nett *a* 40 cents - -	195 20	
1 pipe gin 127. 7. 120 galls. St. - -	120 00	
1 " " 112. 12. 112 " " - -	112 00	
		$1516 40

99.

This sum we expect he has accounted with Messrs. Frost, Jencks & Co. which you will see after.

The alleged cause of the seizure and detention was, trade in articles contraband of war, by the landing of the powder and muskets in Chili, aforesaid.

Upon the trial of the cause upon the evidence, aforesaid, the following questions occurred, upon which the opinions of the Judges were opposed; and, thereupon, it was ordered by the Court, on motion of Samuel Hubbard, of counsel for the plaintiffs, that the points on which the disagreement happened, should be certified to the Supreme Court of the United States for their decision, viz:

Questions on which the Judges were opposed in opinion.

First.—Whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause.

Second.—Whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo.

Third.—Whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the defendants allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo.

Fourth.—Whether a General in the military service of Spain, subordinate to La Serna, Vice Roy of Peru, under the King of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemation thereof.

Fifth.—Whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property.

Sixth.—Whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular.

I, Francis Bassett, Clerk of the Circuit Court of the United States for the Massachusetts district, do hereby certify, that the aforewritten copy of the proceedings of said court, in the case of Edward Carrington, Samuel Wetmore, and Willard W. Wetmore, *versus* the Merchants' Insurance Company, consisting of forty-nine pages, is a just and true copy from the original acts and